

SIMUKAI GIBSON CHIHANGA
And
BEHOME GUEST HOUSE (PVT) LTD
Versus
SHERIFF OF THE HIGH COURT N.O
And
ENGEN OIL ZIMBABWE (PVT) LTD
And
NEWTON MAKAVA
And
GIDEON NGWENYA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 JULY 2020 AND 3 JUNE 2021

Opposed Application

Advocate S Siziba, for the applicants
No appearance for the 1st, 2nd and 3rd respondents
S Mguni, for the 4th respondent

TAKUVA J: In this application the applicants seek an order in the following terms;

- “1. The first respondent’s decision confirming the sale under case No. HC 4159/17, SSB 47/18 be and is hereby set aside.
2. The first, second and third respondents be and are hereby ordered to pay costs of this application only if the same is opposed.”

BACKGROUND FACTS:

The 2nd respondent obtained judgment against 1st and 2nd applicants for a sum of \$11 380-19 under HC 4159/17. Pursuant to that judgment, a writ of execution against immovable property was duly issued against the applicants. The 3rd respondent also obtained judgment against 1st applicant under HC 2291/15 for a sum of \$21 500-00 together with interest. A writ of execution against property was issued against the 1st applicant.

Consequently, 1st applicant’s immovable property being Lots 127 and 128 Northlynne of 100 Acre Charlie Bulawayo Township measuring 3 742m² was duly attached by 1st respondent on the instruction of 2nd respondent. It is common cause that 3rd respondent who was owed a sum of \$21 500-00 by 1st applicant lodged his writ of execution with 1st respondent

as a participating writ upon the sale of 1st applicant's immovable property. In due course, 1st applicant's property was sold to the 4th respondent who was declared the highest bidder at a public auction conducted by 1st respondent. The applicants then lodged an objection with 1st respondent against the confirmation of the sale.

A hearing was duly conducted by the 1st respondent on the objection and the objection against the confirmation of the sale was dismissed on the grounds that despite the applicants fully paying the 2nd respondent, they still owed \$21 500-00 of the participating writ to 3rd respondent and Sheriff costs and commission. Therefore the sale to the 4th respondent was duly confirmed by the 1st respondent and 4th respondent has paid in full the purchase price. Aggrieved, applicants then filed this application to set aside 1st respondent's decision to confirm the sale.

The parties agreed that the sole issue for determination is whether or not the confirmation of the sale by 1st respondent was irregular. The applicants' contention is that the confirmation of the sale was done in an irregular manner in that 1st respondent did not follow the court rules. This is made abundantly clear in paragraphs 17 – 18 of applicants' founding affidavit and the heads of argument. Applicants argued that the 1st applicant's property which was attached on the instruction of 2nd respondent's writ was supposed to be released from attachment immediately after payment of the debt by them to the 2nd respondent. In their view, the 1st respondent was supposed to restart the process of attachment in respect of 3rd respondent's participating writ. Failure to do that means that 1st respondent's confirmation of the sale to satisfy the participating writ was therefore irregular and contrary to the rules of the court.

Sales in execution where there is/or are participating writs are provided for in Order 40 rule 327 (2) of the High Court Rules 1971. The rule provides that:-

“Where more than one writ has been lodged with the Sheriff in respect of any property to be sold in execution, the Sheriff shall not cancel or consent to the cancellation of the sale in execution unless all the writs have been withdrawn or suspended in terms of subrule (1).”

In casu it is common cause that the 3rd respondent lodged a participating writ of execution for \$25 500-00 with 1st respondent. Further, it is also common cause that at the time the objection for confirmation of the sale was heard, the applicants had not settled the debt. To

date the applicants are still owing the 3rd respondent. The 1st respondent confirmed the sale because the 3rd respondent never at any stage withdrew or suspend the participating writ. At law, 1st respondent was compelled to confirm the sale in that the wording of rule 327 (2) is peremptory and leaves 1st respondent with no discretion to exercise. I find therefore that 1st respondent's decision to confirm the sale is lawful, regular and in terms of the rules of the court.

In *Hardwork And Associated Rehabilitation Industries (Pvt) Ltd & Ano v Zimbabwe Banking Corporation Ltd & Ors* SC 92-2007 UCHENA J (as he then was) interpreted the rule in the following words;

“Rule 327 (2) compels the Sheriff to proceed with the sale even if the original creditor instructs him to suspend the sale if more than one writ has been lodged with him. He can only stop the sale if all the writs have been withdrawn. In the present case ZIMBANK had suspended its writ but STANBIC had not, so the Sheriff was compelled to proceed with the sale in execution. The Sheriff did not therefore commit any irregularity when he proceeded with the sale in the circumstances.” (my emphasis)

A sale in execution should not be taken lightly by the courts and be interfered with on the basis of hard-luck stories – see EBRAHIM JA's comments in *Naran v Midlands Chemical Industries* S-220-91 where he said;

“It would be commercially unacceptable for courts to have the power to set aside deals on the basis that, in the absence of mistake or fraud or other legitimate ground, one party made a bad bargain. Midlands was the author of its failure to prevent the sale, or to procure or arrange for their backer to attend affectively the properly advertised sale to bid for the property. The inchoate sale to the appellant Naran (yet to be perfected by delivery) should and cannot be lightly impugned. See *Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 @ 571 H...”

Further, the principle that a judicial sale which has been confirmed will not readily be set aside was reaffirmed in the case of *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260 D-E, where GUBBAY CJ said:-

“Before a sale is confirmed in terms of Rule 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura* supra at 283 A-D. Once confirmed by the Sheriff in compliance with rule 360, the sale of the property is no longer conditional. That being

so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of rule 359 for it to do so ...”

Applicants’ contention that they were not served with the notice of attachment and therefore were in the dark as regards the participating writ cannot be genuine in that the participating writ for the 3rd respondent was the basis for the dismissal of applicants’ objection. This is clear from the reading of the ruling by the 1st respondent attached as Annexures G1-G2. The applicants’ contention that rule 331 was not complied with has no merit.

I take the view that there are no legal grounds for setting aside the confirmation of the sale. The confirmation is regular and in terms of the rules of this court. The applicants are the authors of their problems in that they failed to settle their financial obligations timeously.

Disposition

The application is dismissed with costs.

V.J Mpofo & Associates, applicants’ legal practitioners
Messrs Wintertons c/o Mashayamombe & Co. Attorneys, 2nd & 3rd respondents’ legal practitioners
R. Ndlovu and Company, 4th respondent’s legal practitioners